Supreme Court, U.S.
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No. 85-90

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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JONES DAIRY FARM,
*Petitioner,*

v.

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether a unanimous Court of Appeals, on rehearing, properly applied the standards for judicial review of a labor arbitration award when it, contrary to the District Court, upheld the enforcement of the arbitrator's award.

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## RESPONDENTS' BRIEF IN OPPOSITION

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### STATEMENT OF THE CASE

Petitioner Jones Dairy Farm ("Employer") and Respondent Local No. P-1236, United Food and Commercial Workers International Union, AFL-CIO ("Union") were parties to a collective bargaining agreement for the period October 1, 1979 to October 1, 1982, and which had provided:

> "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, each party retains its legal rights as in effect prior to the execution of this agreement, and nothing in this Agreement shall be construed as adding to or subtracting from those rights."

(This provision had appeared in every labor contract dating back to the parties' very first labor contract entered into back in 1967. This particular provision has since been modified in the parties' succeeding labor contract.)

The labor contract also provided for a procedure for the adjustment of grievances (Pet. App., pp. A-36-38), and the labor contract also contained the following provision:

> "Article XIV. 1. Since arbitration is provided for grievances . . . the Union will not call or sanction any strike . . . during the terms of this Agreement. . . ."

On December 2, 1981, the Employer had notified the Union it was contemplating the subcontracting of certain janitorial work; there followed meetings between the Union and the Employer with the Union's position being that under the labor contract the Employer had no right to subcontract janitorial work simply because such work could be performed more cheaply by others who would not receive the wages and benefits as were agreed to in the labor contract; and on February 3, 1982, the Employer notified the Union that it had decided to subcontract the janitorial work.

A grievance was then filed claiming that the Employer, by subcontracting the janitorial work, had violated various provisions of the labor contract (Pet. App., p. A-24). The Employer entertained the grievance; the grievance was duly processed, and the Union and Employer being otherwise unable to resolve the grievance, the Union requested arbitration. The Employer "without a peep to the arbitrator's jurisdiction" (Pet. App., p. A-5), agreed to submit the grievance to arbitration. Before the arbitrator the Union and Employer agreed that the issue the arbitrator was empowered to decide was: "Under the collective bargaining agreement between the parties

dated October 1, 1979, what disposition should be made of the grievance . . ." (Pet. App., p. A-23).

On May 25, 1983, the arbitrator issued his decision and award, and it was his conclusion that the subcontracting provision did not permit the Employer to subcontract the janitorial work in dispute where the Employer's purpose was solely to secure lower labor costs. The award required the Employer to provide certain monetary relief to remedy the violation (Pet. App., p. A-35).

The Employer then commenced a timely action in district court seeking to overturn the arbitrator's award; the Union answered and counterclaimed seeking enforcement of the arbitrator's award; and both Employer and Union filed motions for summary judgment in support of their respective positions.

The District Court on January 31, 1984, issued its order granting summary judgment to the Employer and against the Union, and it set aside and vacated the arbitration award on the basis the award:

> "[D]oes not draw its essence from the Collective Bargaining Agreement . . . [and] Further, the award is in manifest disregard of the law and contrary to the National Labor Relations Act and those decisions of the Board implementing provisions of the Act. . . ."

(Pet. App., p. A-19). The Union timely moved the District Court for reconsideration which was denied; the District Court asserting:

> "Where the consent to arbitrate is freely given, this does not in any way require this or any other Court to uphold an award which violates either the law or a long-standing, explicit, well-defined and dominant public policy. . . ."

(Pet. App., p. A-21).

On Appeal, a three-member panel of the Court of Appeals, one member dissenting, affirmed the District Court (*Jones Dairy I*) and the majority opinion asserted:

> ". . . The [labor] agreement has no impact upon the issue in dispute. The arbitrator is simply expressing his opinion on a legal question, and courts (the bearers of expertise in such matters) are free to correct a mere mistake of law, as done by the District Court in its judgment setting aside and vacating the award. . . ."

(Pet. App. p. A-9). The dissenting opinion had stated:

> "The most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final. Its finality is seriously compromised if an error of law by the arbitrator is grounds for requiring the arbitrator to start over. Of course haste makes for error. But this is just to say that there is a trade off between celerity and accuracy. . . ."

(Pet. App., pp. A-12-13).

The Union filed a petition for rehearing with suggesgestion for rehearing en banc, and on April 24, 1985, the same three-member panel of the Court of Appeals issued an order granting the Union's petition for rehearing; dismissing the suggestion for rehearing *en banc* as moot; vacating the earlier decision in *Jones Dairy I*; and issuing a superseding decision and opinion (*Jones Dairy II*) (Resp. App., p. A-1).

The superseding decision (*Jones Dairy II*) was unanimous and it stated in material part:

> ". . . Since Jones Dairy Farm, by submitting without a peep to the arbitrator's jurisdiction, admitted the competence of the arbitrator to determine its 'legal rights,' it cannot complain that the arbitrator exceeded his authority by determining them. Of course the arbitrator may have made a mistake in

> the course of exercising that authority; but we have found no case where the arbitrator's award was set aside just because he had made a legal error. . . ."

(Pet. App., p. A-5). The Court of Appeals' judgment was entered April 24, 1985, and it reversed the District Court's judgment and remanded with directions to enforce the award (Pet. App., p. A-22).

The Employer's petition for certiorari to this Court then followed.

## REASONS FOR DENYING THE WRIT

The petition for writ of certiorari and the decision below (*Jones Dairy II*) present no issues warranting review by this Court.

It would appear that Petitioner seeks to invoke Supreme Court Rule 17(c) in that it claims that the Court of Appeals' decision (*Jones Dairy II*) "has decided a federal question in a way in conflict with applicable decisions of this Court." (See Pet. Br. p. 5, n. 5 and cases cited therein.) No other basis are invoked by Petitioner to support its claim that the underlying controversy that existed between the Union and Employer would warrant the utilization of the valuable resources of this Court. See, e.g., *United States v. Johnston*, 268 U.S. 220, 227 (1925); Brennan, J., *Some Thoughts On The Supreme Court's Work Load*, 66 Judicature 230 (1983).

Indeed, the Petitioner itself in its earlier answer to the Union's petition for rehearing and suggestion for rehearing *en banc* then represented to the Court of Appeals:

> ". . . This case really deals with a highly unusual, if not unique, situation in which an arbitrator addressed propositions of law rather than principles of contract. The disagreement between the majority opinion and the dissent concerned an issue the likes

> of which may never appear again. . . Both the majority opinion and the dissent avowed their allegiance to the proposition set forth in *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that an arbitrator's award should be enforced only if it 'draws its essence' from the collective bargaining agreement. . . ."

(See Petitioner's Answer to Union's Petition for Rehearing With Suggestion for Rehearing En Banc pp. 1-2, pp. 4-5, dated March 11, 1985.)

While the Petitioner disagrees with the resolution reached on rehearing by the Court of Appeals in this "highly unusual, if not unique situation" *ibid.*, Petitioner's dissatisfaction is hardly sufficient to warrant this Court's exercise of its discretionary power to review the Court of Appeals' decision. This case does not involve a constitutional issue, any undecided statutory issue or even "principles, the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1928).

The Seventh Circuit has not departed in this case from the criteria set forth in the *Steel Workers Trilogy*.[1] Neither does the decision (*Jones Dairy II*) represent a departure from prior decisions of the Seventh Circuit. See, e.g., *Smith Steel Workers v. A.O. Smith Corp.*, 626 F.2d 596 (7th Cir. 1980); *Grisbaum v. Meatcutters Local 73*, 696 F.2d 520 (7th Cir. 1982). *Cf. Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982).

The Petitioner appears to have either misread or mischaracterized the decision in *Jones Dairy II* in that Peti-

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[1] *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Also see *W.R. Grace & Co. v. United Rubber Workers Local 759*, 461 U.S. 757 (1983).

tioner claims "the panel decided that the Employer should not prevail because it forfeited its right to judicial review. . ." (Pet. Br. p. 6). The Court of Appeals did not hold that Petitioner was not entitled to judicial review; what the Court of Appeals did hold was that where the parties had authorized an arbitrator to determine what their legal rights were, and the arbitrator then proceeded to do so, the fact that the arbitrator may have made a mistake even of law in the course of exercising that authority is not in and of itself sufficient reason to vacate his award (see Pet. App., pp. A-4-5). Stated another way, an arbitration award does not fail to draw its essence from the labor contract even if the arbitrator may have made a mistake of law provided that the arbitrator's interpretation was grounded in the language of the labor contract and that he was acting within the authority the parties had placed within him.

This principle represents nothing new, for as Judge Posner in his dissenting opinion in *Jones Dairy I* had observed:

> "If it . . . [did], courts would not hesitate to set aside any arbitration award that was infected with a legal error . . . The principle that courts will defer even to the legal determinations of labor arbitrators is established in a long line of cases, none of which my brethren cite [citations omitted] . . . ."

(Pet. App., p. A-12).

Indeed, the Wisconsin Supreme Court as far back as 1901 in dealing with arbitration awards recognized that:

> "We may freely concede that the award is none the less binding because the arbitrators have erred in judgment upon any question of fact or law submitted to them for judgment. Such errors are among the contingencies which parties assume when they select such tribunals. . . ."

*Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 503 (1901). Accord: *Safeway Stores v. Bakery Workers Local 111*, 390 F.2d 79, 82 (5th Cir. 1968).

The Petitioner seeks to make it appear that under the rationale of *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), that it was precluded from raising any defense as to an arbitrator's authority to pass on a subcontracting dispute (Pet. Br. pp. 6-7). This is simply not so. The peculiar substantive language in the labor contract pertaining to subcontracting provided:

> "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, *each party retains its legal rights* as in effect prior to the execution of this Agreement, *and nothing in this Agreement shall be construed as adding to or subtracting from those rights.*"

(Pet. App., pp. A-1-2; emphasis added).

Thus, a literal reading of such subcontracting provision could arguably preclude any dispute over subcontracting from even being subject to the grievance/arbitration provisions of the labor contract and that where, as here, the Employer and Union were otherwise unable to resolve such a dispute, both parties would then be able to use economic force to resolve such dispute, i.e., the Union would be free to engage in a strike. The Petitioner by agreeing to have the particular subcontracting dispute resolved through arbitration thereby became the beneficiary of the federal labor policy promoting arbitration, see *Boys' Market Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), and *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).[2] By the same token, however, by

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[2] The arbitrator recognized this fact when he asserted: "Access to arbitration also forecloses resort to strike or lockout as a means of settling any such disputes." (Pet. App., A-28). The Petitioner has not challenged this conclusion.

deeming the dispute arbitrable, Petitioner necessarily agreed to subject to an arbitrator its claim that it had an absolute right to subcontract under the labor contract.

The arbitration award did not hold that Petitioner was totally precluded from subcontracting; it simply held that the Petitioner's subcontracting of the janitorial work in order to escape the wage and benefit obligation contained in the labor contract that it had agreed to was precluded (Pet. App., p. A-33).[3] In arriving at this conclusion the arbitrator admittedly looked to external law ". . . But he was looking out because the contract told him to look out. The contract made the external law on the question a part of the contract . . ." (Posner, J. dissenting, *Jones Dairy I*, Pet. App. p. A-10).

Thus, at the core of Petitioner's argument is not that it was denied judicial review, which it was not, but rather the Court of Appeals' refusal to overturn a labor arbitration award based upon Petitioner's claim that the arbitrator had erred in construing the external law that had been developed under the National Labor Relations Act and relating to subcontracting.

The Court of Appeals observed:

> "If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop them. It would be odd if having consented to have the arbitrator decide what its legal rights to contract out work were, Jones Dairy Farm could then have the same question redetermined by two courts—the district court and this court. We hold it could not, and therefore that the judgment must be reversed with instructions to enforce the arbitrator's award. . . ."

(*Jones Dairy II*, Pet. App. pp. A-4-5).

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[3] This result is consistent with *UAW, Local 391 v. Webster Electric Co.*, 299 F.2d 195 (7th Cir. 1962). Also see *L.A. Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
April 24, 1985

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. EDWARD DUMBAULD, *Senior District Judge**

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No. 84-1301

JONES DAIRY FARM,
*Plaintiff-Appellee,*
vs.

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
*Defendant-Appellant.*

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Appeal from the United States District Court for the Western District of Wisconsin
No. 83 C 747—John C. Shabaz, *Judge*

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ORDER

The petition for rehearing is GRANTED, the previous decision is VACATED, and a superseding decision has been rendered in an opinion published this day.

The suggestion of rehearing *en banc* is DISMISSED as moot.

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* Honorable Edward Dumbald of the Western District of Pennsylvania, sitting by designation.